No. 19-30353

IN THE

United States Court of Appeals for the Fifth Circuit

JUNE MEDICAL SERVICES, LLC d/b/a HOPE MEDICAL GROUP FOR WOMEN, on behalf of its patients, physicians, and staff; and DR. JOHN DOE 1 and DR. JOHN DOE 3, on behalf of themselves and their patients,

Plaintiffs-Respondents,

v.

REBEKAH GEE, in her official capacity as Secretary of the Louisiana Department of Health; and JAMES E. STEWART, SR., in his official capacity as District Attorney for Caddo Parish,

Defendants-Petitioners.

Response in Opposition to Petition for Writ of Mandamus filed by Defendants-Petitioners Concerning the Decision of the United States District Court for the Middle District of Louisiana (No. 3:17-CV-404)

RESPONSE IN OPPOSITION TO DEFENDANTS' PETITION FOR WRIT OF MANDAMUS

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CERTIFICATE OF INTERESTED PERSONS

No. 19-30353, *June Med. Servs., LLC, et al. v. Rebekah Gee, et al.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs	Plaintiffs' Counsel
Current Plaintiffs 1. June Medical Services, LLC d/b/a Hope Medical Group for Women 2. Dr. John Doe 1 3. Dr. John Doe 3 **Former Plaintiff** 1. Dr. John Doe 7	**Current Counsel** 1. Debevoise & Plimpton, LLP (Shannon Rose Selden, Amanda M. Bartlett, Zachary H. Saltzman) 2. Rittenberg, Samuel & Phillips LLC (Charles M. Samuel, III) 3. Center for Reproductive Rights (Jenny Ma, Caroline Sacerdote, Alexandra S. Thompson) **Former Counsel** 1. Center for Reproductive Rights (David Brown, Zoe Levine)

Defendants	Defendants' Counsel
1. Rebekah Gee, Secretary of the Louisiana Department of Health 2. James E. Stewart, Sr., District Attorney for Caddo Parish	**Current Counsel** 1. Louisiana Department of Justice (Jeff Landry, Louisiana Attorney General; Elizabeth B. Murrill, Solicitor General) 2. Schaerr Duncan LLP (Stephen S. Schwartz) **Former Counsel** 1. Schaerr Duncan LLP (S. Kyle Duncan)

/s/ Shannon Rose Selden

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INTRODUCTION

Defendants' petition asks this Court to grant the extraordinary remedy of mandamus to reverse an ordinary denial of a motion to dismiss. The petition should be summarily rejected. Appellate review is reserved for final judgments or, in the rare case, an issue certified by a district court as requiring interlocutory appellate guidance; it is not available at the pleading stage. The narrow exception to that fundamental rule governing the relationship between the Courts of Appeals and the District Courts is a writ of mandamus to redress only those issues irremediable on an ordinary appeal.

Defendants fall far short of the extraordinarily high standard required to obtain a writ of mandamus. A writ of mandamus is a "drastic and extraordinary remed[y]." It is granted ***only*** in rarest of circumstances, and only when petitioners clear two exceedingly high bars: (1) petitioners must show that the district court "*clearly and indisputably erred*" and (2) even if the district court clearly and indisputably erred, an appellate court cannot grant mandamus unless the error is "*irremediable on ordinary appeal*." Even in the exceptionally rare case in which these two factors are met,

mandamus is "not [granted] as a matter of right." It is "an extraordinary remedy reserved for extraordinary cases."

Nothing extraordinary happened here. This was a denial of a motion to dismiss. The District Court appropriately recognized that the Fifth Circuit has long instructed that motions to dismiss are viewed "with disfavor" and should be granted "rarely." It recognized that it must accept all well-pleaded facts as true and view them in the light most favorable to plaintiffs. It concluded that Plaintiffs' claims could be readily assessed under, and easily cleared, those well-established pleading standards. It held not only that the Amended Complaint was adequate, but, considered and found, that it did not raise any issue requiring interlocutory appellate review.

Nothing about that straightforward analysis or the resulting decision warrants mandamus. Lowering that appropriately discerning standard to grant the relief Defendants seek would have consequences far beyond this case. The issues that serve as the basis for Defendants' request are common to virtually ***every*** litigant and ***every*** type of case, namely: time, cost, burden, and risk of loss. Any defendant who believes a motion to dismiss was wrongly decided would prefer immediate appellate review and if this Court grants Defendants' petition, every defendant may seek it.

If this Court were to stretch its own precedent to consider the substance of Defendants' request, it should still reject the petition because it is improperly targeted at the allegations of a complaint that has been superseded and is no longer operative. Defendants' petition ignores the actual pleadings in Plaintiffs' currently operative Amended Complaint and what the District Court held in denying the motion to dismiss that Amended Complaint. Instead, Defendants favor rehashing issues raised by the Initial Complaint, motion, and decision. In seeking interlocutory appeal of that earlier decision, Defendants insisted that the "cumulative effects" approach they objected to in Plaintiffs' Initial Complaint and the District Court's denial of Defendants' first motion to dismiss would be fully resolved by individualized allegations identifying, on a statue-by-statute or regulation-by-regulation basis, the laws at issue and the basis for the challenge. Defendants expressly conceded as an "uncontroversial point" that "when *individual* abortion laws are challenged, their effects—like the effects of challenged laws in any other field—should be evaluated based on the background of existing law." Mem. in Support of Defs.' Mot. for Interlocutory Appeal, ECF No. 65-1 at 8 (emphasis in original).

This is precisely what Plaintiffs did and what the District Court accepted. The Amended Complaint specifically identifies and individually challenges 26 statutes and regulations. The Amended Complaint contains detailed allegations—all of which must be presumed true and construed in Plaintiffs' favor at the pleading stage—showing how each and every one of the individually challenged statutes and regulations imposes an undue burden on abortion. The District Court carefully reviewed the Amended Complaint and correctly concluded that Plaintiffs had provided adequate notice of their claims as to each individual statute and regulation.

Defendants' petition ignores all of that in favor of revisiting an objection that is wholly moot. Defendants object that in addition to finding Plaintiffs' individualized challenges adequate, the District Court also noted that it could consider the harm caused by those individually challenged statutes ***in the context*** of the other challenged statutes. Now that Plaintiffs have amended their Initial Complaint to provide Defendants with exactly what they asked for, Defendants argue that mandamus is required to correct the very point they conceded was uncontroversial.

To create the illusion that this case presents an issue for mandamus, Defendants repeatedly impugn the District Court's integrity and accuse the

District Court of ignoring ordinary pleading standards in pursuit of its "preferred set of policy goals." Such fabricated charges of bias have no support in the record. The record shows that the District Court carefully considered the law, the pleadings, and the parties' arguments, and appropriately weighed them. It also shows that the District Court was willing to certify Defendants' question for interlocutory appeal when it appeared warranted. The record also reflects that the District Court considered a second request for interlocutory appeal but found that the Amended Complaint addressed the issue and no longer required appellate guidance at the pleading stage. There is no basis whatsoever to impugn the District Court's careful approach to, and considerations of, these important issues. Defendants' request amounts to nothing more than a transparent attempt to create exactly what they claim to oppose: separate rules to govern abortion cases.

The Federal Rules of Civil Procedure apply in this case no differently than they do in every other case. This case should continue to discovery, after which Defendants can move for summary judgment, petition for appeal if they lose, and ultimately challenge any holding of law or finding of fact if the case proceeds to trial and they are dissatisfied with the result or remedy.

None of Defendants' concerns about the pleadings, discovery, or relief are ripe.

The issues raised in this case are important. They may one day warrant this Court's review. They do not, however, satisfy the standard for the grant of a writ of mandamus nor warrant a departure from it. For these and the other reasons herein, Defendants have not shown sufficient cause to warrant a grant of mandamus.

PROCEDURAL HISTORY

Defendants' petition grossly misrepresents the contents of the Amended Complaint and the holdings of the District Court. After their motion to dismiss the Initial Complaint was denied, Defendants sought interlocutory appeal, asserting that Plaintiffs had not specifically identified and challenged individual statutes and regulations so as to provide Defendants with sufficient notice as to which statutes and regulations were challenged. Plaintiffs ***volunteered*** to provide the requested specificity and amended their Initial Complaint, stating claims statute-by-statute and regulation-by-regulation. The District Court then denied Defendants' motion to dismiss the Amended Complaint and declined to certify issues for interlocutory appeal. Defendants now seek mandamus, compelling

dismissal of two of Plaintiffs' claims—but all of their arguments appear to target the Initial Complaint and decision, while ignoring the operative Amended Complaint and subsequent decision of the District Court.

A. Initial Complaint

On June 27, 2017, Plaintiffs filed the Initial Complaint alleging that the 12 Sham Health Statutes and the Outpatient Abortion Facility Licensing Law ("OAFLL"), as applied and enforced by the Louisiana Department of Health ("LDH") through its implementing regulations, posed undue burdens on the right to abortion. *See* Compl., ECF No. 1. The Initial Complaint challenged laws that have been implemented and applied to (a) drastically limit the number of healthcare providers who can offer abortion care, (b) consolidate them into a handful of facilities, and (c) burden those facilities with arbitrarily enacted and enforced regulations until they close.

Defendants moved to dismiss the Initial Complaint. On March 30, 2018, the District Court partially denied Defendants' motion to dismiss (the "Order"), holding that the Initial Complaint adequately pleaded that "OAFLL, as enacted through LDH's regulations, and [the Sham Health Statutes] impose an undue burden on women seeking an abortion in Louisiana." Ruling & Order, ECF No. 60 at 6-7. The District Court

considered the effects of the challenged statutes in context, finding that courts routinely consider abortion regulations "in connection with the larger regulatory scheme," just as they do "where other constitutional rights are at issue." *Id.* at 9. Any other approach "would allow the State to transform unconstitutional action into constitutional action by splitting the action into separate statutes or regulations." *Id.* at 10. The District Court found that the specific allegations adequately pleaded a Substantive Due Process claim as to both the "twelve specific statutes" and "OAFLL, as applied through regulations." *Id.* at 10-11.

Defendants sought 28 U.S.C. § 1292(b) certification of the Order as to Count 1. Defendants argued that there were two questions raised by the Order: "(1) whether Plaintiffs' as-applied 'cumulative-effects' challenge to Louisiana's system of abortion regulation validly states a claim, and (2), even if it does, whether the challenge as stated satisfies the due process and fair notice requirements of Article III." Defs.' Mot. for Interlocutory Appeal, ECF No. 65 at 7. On May 15, 2018, the District Court granted Defendants' request for interlocutory appeal. Ruling and Order, ECF No. 76 at 3.

B. Amended Complaint

Because Plaintiffs believed that they could amend the Initial Complaint to moot the questions Defendants posed and thereby avoid unnecessary delays associated with the interlocutory appeal, on June 1, 2018, Plaintiffs moved the District Court to rescind its § 1292(b) certification and allow Plaintiffs to voluntarily amend. ECF No. 79-1 at 4. The District Court granted the motion. It recognized that Defendants' core complaint was that Plaintiffs had failed to identify which of the OAFLL regulations were being challenged and that Defendants felt "the right course would be to require the plaintiffs" to "specify exactly which regulations they challenge, exactly which provision of the health statutes they care about and which they don't" and to plead "facts showing . . . standing, plead facts showing undue burden." Ruling & Order, ECF No. 83 at 4 (internal citations omitted). The District Court agreed with Plaintiffs that amending "has the potential to cure Defendants' main reason for requesting the interlocutory appeal: the lack of specificity in Plaintiffs' cumulative effects challenge." *Id.* at 4. Although it granted leave to amend, the District Court cautioned that it would not "hesitate to re-certify the order" for interlocutory

appeal if the proposed amended complaint "does not ameliorate the issues raised in Defendants interlocutory appeal." *Id.* at 5.

Plaintiffs filed an Amended Complaint on June 11, 2018. As relevant here, the Amended Complaint: (1) contains a narrow challenge to the OAFLL statute, based on the burdens it imposes directly and in context, and as implemented by each of the challenged OAFLL Regulations—a term defined in the Amended Complaint to include only the 13 challenged regulations at issue in this case[1] (Count 1); (2) pleads individual due process challenges against 12 Sham Health statutes (Count 2) and 13 OAFLL Regulations (Count 3); and (3) contains an equal protection challenge as to each of the specifically identified statutes and regulations (Count 5).

In setting forth those claims, Plaintiffs specifically identify and challenge 26 laws and regulations—the 12 Sham Health Statutes, the 13 OAFLL Regulations, and OAFLL—and allege that each law or regulation, on its own and in context, poses an undue burden on the constitutional right

[1] The 13 OAFLL Regulations are: La. Admin. Code tit. 48, §§ 4401 (licensing regulation), 4403 (licensing regulation), 4407 (state-mandated inspection and patient record access requirement), 4411 (licensing regulation), 4417 (suspension without notice requirement), 4423 (medical and non-medical staffing regulations), 4425 (state-mandated access to confidential records), 4431 (redundant testing and mandatory misinformation), 4433 (the arbitrary provider regulation), 4435(C) (medically unnecessary staffing), 4437(A)(4)–(5) (medically unnecessary post-operative care), 4437(B)(1) (24-7 medical record access), and 4445 (physical plant restrictions).

to abortion. Specifically, Plaintiffs challenge the requirements regarding physical plant, administration, and recordkeeping, Am. Compl., ECF No. 87 ¶¶ 69-88; providers, *id.* ¶¶ 89-100; provision of care, *id.* ¶¶ 101-13; mandatory provision of false and misleading information, *id.* ¶¶ 114-19; and invasive inspection practices and penalties, *id.* ¶¶ 120-52; and allege in detail how those restrictions are unconstitutional.

Plaintiffs' equal protection challenge is a similarly straightforward challenge and is supported by detailed pleadings showing that the specifically identified statutes and regulations unconstitutionally single out abortion and the providers of such care. *Id.* ¶¶ 54-59, 176-83, 193; *see also* Mem. in Opp'n to Mot. to Dismiss, ECF No. 98 at 27-31.

Defendants' petition misrepresents the allegations in the Amended Complaint. A few of the most obvious examples of those misrepresentations are detailed below.

Defendants mischaracterize Plaintiffs' challenge to OAFLL as "including every statute that forms OAFLL and (presumably) all the regulations implementing it." Pet. at 9. Plaintiffs are clear, however, that they are only challenging the 12 Sham Health Statutes individually, the 13 OAFLL Regulations individually, and OAFLL based on the burdens it

imposes directly and as implemented through each of the specifically identified OAFLL Regulations—a total of 26 laws, each challenged individually. Am. Compl. ¶¶ 184-89; *see also* Mem. in Opp'n to Mot. to Dismiss, ECF No. 98 at 16-19.

Failing to take the facts alleged in the Amended Complaint as true, Defendants claim that the OAFLL regulations and Sham Health Statutes are "common-sense health, safety, and licensing laws." Pet. at 18. Plaintiffs alleged, however, that the laws "provide no medical benefit." Am. Compl. ¶ 6; *see also id.* at ¶ 135 ("LDH virtually ensures that minor clerical oversights will occur for which the clinic can face . . . serious sanctions, even though the oversight has no bearing on health and safety.").

Additionally, Defendants claim that Plaintiffs "purport[] to challenge [the statutes and regulations] individually" without alleging facts required to state a claim. Pet. at 10-11. In so claiming, they ignore the factual allegations made with respect to each individually challenged law.[2] For example, Defendants misrepresent Plaintiffs' claims with respect to medical staffing qualifications for outpatient abortion facilities. Pet. at 11. The

[2] For a more detailed defense of pleadings, please refer to Plaintiffs' Memorandum in Opposition to Motion to Dismiss, ECF No. 98.

Amended Complaint contains detailed allegations supporting its challenges to La. Rev. Stat. §§ 14:32.9, 14:32.9.1, 40:1061.10(A)(1). *See* Am. Compl. ¶¶ 60(c), 89-91, 93-94, 96, 100, 153-83, 189.

Following its filing, Defendants asked the District Court for partial dismissal of Plaintiffs' Amended Complaint, or, in the alternative, an interlocutory appeal. Plaintiffs opposed. On March 29, 2019, the District Court denied Defendants' motion to dismiss, holding that "Plaintiffs have presented adequate plausible arguments regarding how such regulations and statutes unconstitutionally burden women seeking abortion services." Ruling & Order, ECF No. 103 at 15. The Court noted that "Plaintiffs have even gone so far as to list in the Amended Complaint the specific statutes they deem objectionable, and provide reasons, albeit repetitive ones, as to why the individual statute runs afoul of the rights of Plaintiffs and their patients." *Id*. at 15-16.

The District Court also reexamined Defendants' reasons for seeking an interlocutory appeal and concluded that an interlocutory appeal was no longer necessary. The District Court stated that, "whether by virtue of *Hellerstedt*, or by the regular 'plausibility pleading' standards required at this stage of the litigation, Plaintiffs have successfully pled their case." *Id.*

at 20. The Court found that "this is not a case of first impression. Put simply, Plaintiffs have properly pleaded a cumulative effects cause of action under *Hellerstedt*, and have sufficiently pleaded a cause of action for each challenged regulation or statute on an individual basis that meet the federal pleading standard." *Id.*

Unwilling to accept that Plaintiffs' case may proceed to discovery, and believing that they are entitled to a different set of federal and appellate procedures because this is an abortion case, Defendants have now filed a petition for writ of mandamus that grossly mischaracterizes Plaintiffs' Amended Complaint, misrepresents the District Court's decision, and asks this Court to answer hypothetical questions not raised by either the Amended Complaint or the District Court's decision.

ARGUMENT

Plaintiffs' challenge to the 26 specifically identified statutes and regulations is at the motion to dismiss stage. In this Circuit, a motion to dismiss "is viewed with disfavor and is rarely granted." *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011) (quoting *Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009)). The Court must "accept all well-pleaded facts in the complaint as true and view them in the light most

favorable to the plaintiff," *Hall v. Louisiana*, 12 F. Supp. 3d 878, 884 (M.D. La. 2014) (Jackson, C.J.); *accord Hines v. Alldredge*, 783 F.3d 197, 200-01 (5th Cir. 2015) (quoting *True v. Robles*, 571 F.3d 412, 417 (5th Cir. 2009)), and the complaint must only be "plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). While a complaint must set forth something "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action," "detailed factual allegations" are not required. *Twombly*, 550 U.S. at 555. Constitutional claims are not required to be pleaded with particularity; Rule 8 requires simply "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Wooten v. McDonald Transit Assocs., Inc.*, 788 F.3d 490, 498 (5th Cir. 2015).

In denying Defendants' motion to dismiss, the District Court faithfully applied the well-established Rule 8 notice pleading standard. It did so in a manner no different than it does in any of the hundreds of other motions to dismiss it has decided. It took Plaintiffs' pleadings as true—as it must at

this stage—and made sure that Plaintiffs' claims were facially plausible and adequately put Defendants on notice. After carefully reviewing the Amended Complaint and the briefing on the motion to dismiss, the District Court properly concluded that "Plaintiffs are not required at this juncture to prove their case or dispel all arguments against their claims" (Ruling & Order, ECF No. 103 at 16); all they are required to do is "offer[] sufficient facts to address each statute on an individual basis." *Id.* at 20. The District Court held that Plaintiffs "***have sufficiently pled a cause of action for each challenged regulation or statute on an individual basis that meets the federal pleading standard.***" *Id.*

Defendants now petition this Court to revisit a routine denial of a motion to dismiss on the theory that the District Court—notwithstanding its own express decision—considered the challenge to the statutes cumulatively and not individually. That request should be denied.

I. Mandamus Is Improper Because the District Court's Decision Is Remediable on Appeal, Not Clearly Erroneous, and Mandamus Is Not Necessary.

A writ of mandamus is a "drastic and extraordinary remed[y]." *Ex parte Fahey*, 332 U.S. 258, 259 (1947); *Kerr v. U. S. District Court*, 426 U.S. 394, 402 (1976). It is granted ***only*** in rare circumstances, and ***only***

when petitioners clear two exceedingly high bars. First, petitioners must show that the district court "*clearly and indisputably erred*." *In re Occidental Petroleum Corp.*, 217 F.3d 293, 295 (5th Cir. 2000). Second, even if the district court clearly and indisputably erred, the appellate court cannot begin to consider granting mandamus unless the clear and indisputable error is "*irremediable on ordinary appeal*." *Id.*

Even in the exceptionally rare case in which these two factors are met, mandamus is "not [granted] as a matter of right." *S. Pac. Transp. Co. v. City of San Antonio Pub. Serv. Bd.*, 748 F.2d 266, 270 (5th Cir. 1984) (quoting *Duncan Townsite Co. v. Lane*, 245 U.S. 308, 311 (1917)). It is "an extraordinary remedy reserved for extraordinary cases." *Id.*

The cases in which mandamus was granted are qualitatively different. They do not involve the basic question of whether a complaint's factual allegations satisfy the pleading standard of the Federal Rules of Civil Procedure 8 and 12. They are truly "extraordinary" cases and involve truly egregious missteps and circumstances wherein a trial court "exceeded its jurisdiction or declined to exercise it," or "has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate

court." *In re Aventel, S.A.*, 343 F.3d 311, 317 (5th Cir. 2003) (quoting *In re Dresser Indus., Inc.*, 972 F.2d 540, 543 (5th Cir. 1992)).

Nothing so extraordinary happened here. This was a denial of a motion to dismiss. Altering appellate practice to grant a petition for that would be unprecedented, would amount to an invitation to every disappointed defendant to file for mandamus after denial of a motion to dismiss, and would therefore be truly disruptive to the orderly progress of litigation in the trial and appellate courts of this Circuit.

A. The District Court's Decision Is Not "Irremediable on Ordinary Appeal."

Defendants' petition cannot clear even the first hurdle required for mandamus because it does not identify a single harm that could not be remedied by ordinary course proceedings.

To satisfy the irremediable harm requirement, a petitioner must show that allowing the regular litigation and appeal process to play out would effectively deny petitioner a remedy. Mandamus is ***never*** justified merely because "hardship may result from delay or from an unnecessary trial." *In re Fibreboard Corp.*, 893 F.2d 706, 707 (5th Cir. 1990) (quoting *In re Willy*, 831 F.2d 545, 549 (5th Cir. 1987)); *In re Occidental Petroleum Corp.*, 217

F.3d at 295 n.8 ("[T]he ordinary inconvenience of a new trial cannot justify the use of the writ." (quoting *Maloney v. Plumkett*, 854 F.2d 152, 154-55 (7th Cir. 1988))); *In re Lloyd's Register*, 780 F.3d 283, 288 (5th Cir. 2015) ("Even though the defendant may be required to engage in a costly and difficult trial and expend considerable resources . . . those unrecoverable litigation costs are not enough to make this means of attaining relief [appeal after final judgment] inadequate."). "There has to be a greater burden, some obstacle to relief beyond litigation costs that renders obtaining relief not just expensive but effectively unobtainable." *In re Lloyd's Register*, 780 F.3d at 289.

For that reason, this Court and its sister circuits routinely hold that a denial of a motion to dismiss does not justify mandamus review. *See, e.g.*, *Ozee v. Am. Council on Gift Annuities, Inc.*, 110 F.3d 1082, 1094 (5th Cir. 1997) (overturned on other grounds) (holding that denial of motions to dismiss and summary judgment is not fit for review by mandamus); *Branson v. City of Los Angeles*, 912 F.2d 334, 336 (9th Cir. 1990) (holding that mandamus would not issue to review an order dismissing one defendant on the basis of judicial immunity); *Auer v. Trans Union, LLC*, 834 F.3d 933, 936 (8th Cir. 2016) (finding that dismissal of all claims against two

defendants would not be reviewed by mandamus because the arguments were of a sort "routinely raised and addressed on a direct appeal"). A writ of mandamus is not a substitute for appeal. *In re Occidental Petroleum Corp.*, 217 F.3d at 295 ("[I]t is more than well-settled that a writ of mandamus is not to be used as a substitute for appeal." (quoting *In re Am. Marine Holding Co.*, 14 F.3d 276, 277 (5th Cir. 1994))); *In re Am. Airlines*, 972 F.2d 605, 608 (5th Cir. 1992); *Miller v. Connally*, 354 F.2d 206, 208 (5th Cir. 1965).

The situations in which this Circuit has found irremediable harm are categorically different. For example, this Circuit has found the ordinary appellate process insufficient where a party alleges abuse of discretion on a forum non conveniens motion because of the difficulty inherent in showing that the failure to grant a forum non conveniens motion was sufficiently prejudicial as to be outcome-determinative. *See, e.g.*, *In re Lloyd's Register*, 780 F.3d at 288-89 (holding mandamus was appropriate where relying on the ordinary appeals process would render relief "effectively unobtainable"); *In re Ford Motor Co.*, 580 F.3d 308 (5th Cir. 2009). Likewise, it has allowed parties to displace the ordinary appeals process where the district court denied a motion to transfer venue. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 319 (5th Cir. 2008) (holding that on appeal a defendant "would be

in the unenviable position of having to show" that the outcome would have been different had the case proceeded in a different venue). And this Court has found that a party can obtain mandamus review of an order compelling production of privileged material because the harm suffered from the disclosure of privileged documents cannot be remedied on appeal. *See, e.g.*, *In re Itron, Inc.*, 883 F.3d 553, 567 (5th Cir. 2018); *In re Avantel*, 343 F.3d at 317 ("[I]t is established that mandamus is an appropriate means of relief if a district court errs in ordering the discovery of privileged documents, as such an order would not be reviewable on appeal."). In each of these contexts, the irremediable harm requirement was met because the ordinary litigation and appellate processes could not provide a remedy.

Defendants' petition purports to identify two harms: (1) being forced to litigate claims that should have been dismissed[3] and (2) potentially facing an onerous remedy. These are entirely insufficient.

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[3] Defendants' petition also identifies as a harm an infringement on Louisiana's sovereign immunity. That argument is baseless. The Supreme Court dictated that suits alleging unconstitutional state actions are allowed. *Ex parte Young*, 209 U.S. 123 (1908) (holding there is no sovereign immunity when a state enforces an unconstitutional law); *see also K.P. v. LeBlanc*, 627 F.3d 115 (5th Cir. 2010) (holding that the State of Louisiana did not have sovereign immunity in a case challenging the constitutionality of a state statute denying abortion providers the benefits of participation in a state fund). Further, this Court has held that claims against the state are not barred when, as here, an official is sued in his official

Defendants' argument that the District Court's denial of the motion to dismiss warrants extraordinary relief because it should not be forced to litigate claims that the state believes have no merit fails as a matter of law and policy. This Court has for decades made it clear that mandamus is *never* justified merely because "hardship may result from delay or from an unnecessary trial." *In re Fibreboard Corp.*, 893 F.2d at 707 (quoting *In re Willy*, 831 F.2d 545, 549 (5th Cir. 1987)). Defendants have provided no basis for departing from that rule here.

Defendants concede that the case is timely and properly venued. Defendants have demonstrated, consistently and with vigor, that they are able to effectively respond to Plaintiffs' claims and to defend them. Among other things, Defendants sufficiently understood the Amended Complaint and the District Court's conclusion to have filed and served an answer and affirmative defenses in response. Defendants have currently served 128 Requests for Production on Plaintiffs. Defendants have participated in conferences with the Magistrate Judge about discovery.

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capacity and there is an ongoing harm that needs remedy. *See NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389 (5th Cir. 2015).

They object—again, as many federal defendants do—to the scope of discovery and extent of information sought, but that is an issue to resolve during the meet-and-confer process and pursuant to the Federal Rules of Civil Procedure—not for the Fifth Circuit Court of Appeals to resolve on a request for a writ of mandamus. Defendants' request that the Court invoke its extraordinary authority to intercede in the case management of the Middle District of Louisiana so to avoid the ordinary course of discovery or summary judgment practice is an abuse of the appellate process.

Defendants' premature concerns about remedy also fail to justify the extraordinary relief they seek for two reasons. *First*, Defendants seek mandamus on the basis of a remedy ***that has not issued***. Fear of a future hypothetical remedy that may not be requested, and which even if requested may not issue, cannot entitle them to an exception from ordinary litigation and appellate practice.

Second, Defendants' petition cannot explain why the hypothetical remedy needs to be addressed now instead of during the ordinary course of litigation. Defendants will have many more opportunities to make their case on the facts and the law before a final judgment is ordered and appropriate relief is fashioned. At this stage, the District Court was required to accept as

true the pleadings in the Amended Complaint. At later stages, and as the evidence develops in the normal course, the District Court will not be so constrained. Summary judgment presents an opportunity—as in any case—for the parties to seek to prevail as a matter of law on the undisputed facts. If facts warrant trial, they will be reviewed and evaluated by the trier of fact. If Plaintiffs succeed at trial, remedy must also be adjudicated in the District Court. Defendants' petition has provided no explanation—and none exists—for why mandamus at the motion to dismiss stage is necessary to avoid the harm of a remedy that has not yet issued. If and when the District Court finally resolves that issue, it will be appropriate for appeal in the ordinary course.

B. The District Court Did Not Clearly and Indisputably Err.

To obtain mandamus, Defendants must show that the court clearly and indisputably erred. Defendants' petition cannot even come close to such a showing. As demonstrated in Section B.1 *infra*, the District Court undertook a routine analysis applying well-settled law to determine whether Plaintiffs had stated claims upon which relief could be granted. Although the District Court went a step further in commenting on the viability of a "cumulative effects challenge," Section B.2 demonstrates that those statements do not

justify mandamus because (a) that is not the holding that allows this case to proceed and (b) the Court was correct in concluding that it was entitled to look at the harms of challenged statutes and regulations in context. Defendants cannot now relitigate their motion to dismiss by filing a writ of mandamus.

1. The District Court Correctly Found that Plaintiffs Met Ordinary Pleading Standards by Pleading Individual Harms.

The District Court correctly found that Plaintiffs met ordinary pleading standards by pleading individual harms from each and every statute and regulation challenged in Counts 1-3 and Count 5. Ruling & Order, ECF No. 103 at 6-12. The District Court recognized that Plaintiffs specifically identify 12 individually challenged statutes, Am. Compl. ¶¶ 60–61, and 13 individually challenged regulations, *id*. ¶¶ 54–56, and OAFLL, *id.* at 57-59, and allege facts showing that each imposes an undue burden on the right to abortion care, and imposes unnecessary obstacles and burdens on providers of such care (but not other similarly situated providers). Such pleadings are exactly what Defendants insisted was required. *See* Ruling & Order, ECF No. 83 at 4 (quoting Defendants' oral argument statement that "'[t]hey should specify exactly which regulations they challenge, exactly which

provision of the health statutes they care about and which they don't. Plead facts showing . . . standing, plead facts showing undue burden.'").

Applying the well-established pleading standard on a motion to dismiss, the District Court found, taking the allegations in the Amended Complaint as true, that Plaintiffs had pleaded facts sufficient to support their challenge to each statute and regulation under the normal Rule 8 pleading standard. *See* Ruling & Order, ECF No. 103 at 20.[4] In so holding, the District Court noted that the Amended Complaint lists "the specific statutes [Plaintiffs] deem objectionable, and provide[s] reasons, albeit repetitive ones, as to why the individual statute runs afoul of the rights of Plaintiffs and their patients." Ruling & Order, ECF No. 103 at 15-16. The District Court continued to hold that "Plaintiffs have presented adequate and plausible arguments regarding how such regulations and statutes unconstitutionally burden women seeking abortion services." *Id*. at 15. Having made those determinations, the District Court concluded that Plaintiffs' adequately

[4] In an attempt to characterize the petition as anything other than an appeal of the denial of their motion to dismiss, Defendants suggest that the District Court exceeded its Article III powers. As demonstrated in Plaintiffs' opposition to the motion to dismiss, the Amended Complaint asserts justiciable claims and asked the District Court to do nothing more than exercise its core Article III functions. In denying the motion to dismiss, the District Court did not entangle itself in a political question or in any way exceed its Article III powers. Mem. in Opp'n to Mot. to Dismiss, ECF No. 98 at 19-25.

pleaded their claims under the "regular 'plausibility pleading' standards required at this stage of the litigation." *Id.* at 20.

Such a holding is well within the jurisdiction of the District Court and amounts to nothing more than the ordinary application of well-settled law. Adhering to well-established law of this Circuit cannot possibly constitute "clear[] and indisputabl[e]" error.[5] The District Court's core holding was that the Amended Complaint satisfied the basic notice pleading standard (without any reference to cumulative effects). That uncontroversial holding is the basis of the District Court's denial of Defendants' motion to dismiss and provides no basis for mandamus review. Accordingly, Defendants'

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[5] Accordingly, the petition's questions about whether Plaintiffs can "challenge the cumulative effects of a State's statutes and regulations governing abortion clinics without including well-pleaded, justiciable claims as to each law individually" are inapplicable. Petition at 2. As explained *supra*, the District Court recognized that Plaintiffs *have* alleged well-pleaded, justiciable claims as to each statute and regulation individually. Ruling & Order, ECF No. 103 at 20 (finding "Plaintiffs have sufficiently pled a cause of action for each challenged regulation or statute on an individual basis that meet the federal pleading standard"). The Amended Complaint contains no challenge to statutes or regulations "apart from the identifiable effects" of the challenged statute and regulations. Answering the questions posed in the petition would inappropriately provide advisory opinions on hypothetical questions that would impact matters not implicated in this case. *See United Pub. Workers of Am. (C.I.O.)*, 330 U.S. 75, 90 n.22 (1947) ("It has long been . . . considered practice not to decide abstract, hypothetical or contingent questions, or to decide any constitutional question in advance of the necessity for its decision. . . ." (internal quotations omitted)); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so.").

petition should be denied without any consideration of the District Courts' language discussing cumulative effects.

2. The District Court Correctly Stated that Harms Can Be Considered in Context.

Having held that Plaintiffs adequately pleaded a challenge to each identified statute and regulation individually, the District Court went an extra step to state that Plaintiffs pleaded a "cumulative effects" challenge. That is, the District Court recognized that, as with laws on other issues, it could consider each individually challenged statute and regulation "in context" in deciding whether the pleadings were sufficient, and that viewed in context, the laws also posed an undue burden.

That secondary holding is the main target of this petition—but that focus is wholly misplaced. Where an alternative legal analysis is offered but is not necessary, it is dicta and cannot form a basis even for appeal, much less mandamus. *Abbs v. Sullivan*, 963 F.2d 918, 924 (7th Cir. 1992) ("There is no known basis for appealing a dictum." (quoting *Oxford Shipping Co. v. N. H. Trading Corp.*, 697 F.2d 1, 7 (1st Cir. 1992))); *see also Pegues v. Morehouse Parish School Bd.*, 706 F.2d 735, 738 (5th Cir. 1983) ("Any comment . . . regarding the merits of Pegues' *Singleton* claim was obiter

dicta" which "may not serve as the basis for either a res judicata or law of the case challenge.").

In any event, the District Court's statement that challenged statutes and regulations can be assessed in the context of other challenged statutes and regulations is both unexceptional and undoubtedly correct. It is wholly uncontroversial and widely accepted that courts must consider challenged laws as they operate in context, not as they might operate in a vacuum. From limitations on speech, to interstate commerce, and the conditions of confinement in prisons, courts have considered the constitutionality of existing laws in the legal, factual, and regulatory context in which they exist. *E.g.*, *Clingman v. Beaver*, 544 U.S. 581, 607-08 (2005) (O'Connor, J. concurring) (a court should "examine the *cumulative* burdens imposed by the *overall* scheme" as "[a] panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition"); *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 766 (1976) (with a First Amendment claim, "[t]he relevant factors we have identified are to be considered 'cumulatively'" (quoting *Tilton v. Richardson*, 403 U.S. 672, 688 (1971))); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444-47 (1978)

(considering the challenged regulations as a whole in holding that the burdens imposed on interstate commerce by those regulations outweigh the putative benefits); *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662 (1981) (same); *Wilson v. Seiter*, 501 U.S. 294, 304 (1991) ("*Some* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone . . . ."). As with these other constitutional claims, in abortion cases, courts "look to the entire record and factual context in which the law operates" to assess its constitutionality. *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 (5th Cir. 2014) (holding Mississippi abortion clinic was likely to succeed on the merits of its claim that the state's admitting privileges law would impose an undue burden).

Defendants' suggestion that in the abortion context—and only in the abortion context—courts cannot review challenges to statutes or regulations in context has no basis in law. The Supreme Court did exactly that in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). There, as it does in all circumstances, the Court took a contextual approach to assessing burdens of the challenged regulations. *See id*. at 2313, 2318 (considering the burdens of the statute requiring abortion facilities to meet the requirements of

outpatient ambulatory service centers (ASCs) in context of other ASC regulations).

In so holding, the Court in *Whole Woman's Health* broke no new ground. All circuits, including this one, that have considered the question have reached the same conclusion. The Seventh Circuit held that "[w]hen one abortion regulation compounds the effects of another, the aggregate effects on abortion rights must be considered." *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 796 (7th Cir. 2013). So did the Ninth Circuit, which held that in assessing an undue burden, it is proper to "consider the ways in which an abortion regulation interacts with women's lived experience, socioeconomic factors, and other abortion regulations." *Planned Parenthood of Ariz., Inc. v. Humble*, 753 F.3d 905, 915 (9th Cir. 2014) (holding medication abortion statute, when implemented in conjunction with the state's separate 24-hour waiting period requirement, would impose an undue burden); *see also Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1342 (M.D. Ala. 2014) ("In order to determine the severity of an obstacle that a regulation places on women seeking abortion, the court must examine carefully the effect of the regulation on them, 'considering the real world circumstances.'" (internal

citation omitted)); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809, 819 (7th Cir. 2018) (explaining that "travel distance is the origin of the burden," but "the strain of the law extends into the realm of finances, employment, child care, and domestic safety").

Indeed, in this very case, Defendants previously conceded that consideration of laws in context is "uncontroversial." Mem. in Support of Defs.' Mot. for Interlocutory Appeal, ECF No. 65-1 at 8. In doing so, Defendants stated that "when individual abortion laws are challenged, their effects—like the effects of challenged laws in any other field—should be evaluated based on the background of existing law." *Id*. Defendants object only to the result, not—as their petition would have it—to the approach. Defendants conceded that contextual analysis is appropriate and cannot credibly claim it is such an abuse of authority as to warrant mandamus.

Defendants now assert that a footnote in this Court's decision in *June Medical Services L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018) mandates an entirely different approach. *See* Pet. at 19-20. This Court's footnote held no such thing. The Court in *June Medical* took issue with the District Court's factual findings regarding the hostile "climate" in Louisiana surrounding

abortion, including the *existence* of numerous legal barriers to abortion access, as evidence of the improper purpose behind the challenged admitting privileges requirement. This Court noted that the other *unrelated and unchallenged* abortion regulations were irrelevant to the analysis of whether the challenged act constituted an undue burden. The Court did not hold—and in light of the substantial precedents discussed above including this Court's holding in *Jackson Women's Health Org.*, 760 F.3d at 458, could not be read to have held—that the burden of a challenged statute or regulation must be assessed in a vacuum and without any view as to how the challenged statute or regulation operates in context.

Plaintiffs have pleaded facts demonstrating that each of the challenged statutes and regulations, in context and as they operate in the real world, imposes burdens on the right to abortion that outweigh any purported medical benefit. Am. Compl. ¶¶ 54–56; Mem. in Opp'n to Mot. to Dismiss at 11-16. The District Court, in its alternative holding, correctly concluded that such allegations are sufficient to state a claim. Defendants' argument that each law must be reviewed in a vacuum is inconsistent with settled law

and inconsistent with its prior admissions in this case.[6] There is no clear error, and thus there should be no mandamus review.

C. There Are No Extraordinary Circumstances Justifying Grant of Mandamus.

Even if there was an applicable question to merit a mandamus analysis, and the Court found that the District Court "clearly erred," there are no extraordinary circumstances here that would allow for a grant of mandamus. *See In re Am. Marine Holding Co.*, 14 F.3d 276, 277 (5th Cir. 1994) (holding that a "writ of mandamus is an extraordinary remedy reserved for extraordinary situations"); *see also Ex Parte Fahey*, 332 U.S. 258, 259-60 (1947) (holding that "[a]s extraordinary remedies, [writs of mandamus] are reserved for really extraordinary causes"). It is "only exceptional circumstances amounting to a judicial 'usurpation of power' [that] will justify" the remedy of a writ of mandamus. *See In re Corrugated Container Antitrust*, 614 F.2d 958, 961, n. 4 (5th Cir. 1980) (quoting *Will v. United States*, 389 U.S. 90, 95 (1967)). Further, "the party seeking

[6] Taken to its logical extreme, Defendants' position that each challenged law must be viewed in isolation would (hypothetically) have this Court uphold two regulations as non-burdensome—one that prohibits abortion in rooms painted blue and another that prohibits abortion in rooms not painted blue. Considered separately, neither appears overly burdensome; but together the real-world impact of the regulations would be to ban abortions altogether, which the United States Constitution does not permit.

mandamus has the burden of showing that its right to issuance of the writ is clear and indisputable." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (internal quotations omitted). The present situation does not even come close.

Defendants' petition distorts the Amended Complaint and District Court decision in an attempt to convert a routine motion to dismiss denial into an abuse of judicial power and circumvention of proper procedure. *See In re Catawba Indian Tribe of S.C.*, 973 F.2d 1133, 1135 (4th Cir. 1992) ("The very power of the writ of mandamus demands that its availability be limited to narrow circumstances lest it quickly become a shortcut by which disappointed litigants might circumvent the requirements of appellate procedure mandated by Congress."). This Court should reject that effort. There is no new or unique question, and no special circumstance or remedy. The only issue in this case at the present time is that Defendants lost a motion to dismiss and apparently believe the federal rules of civil and

appellate procedure are optional in abortion cases. A writ of mandamus cannot be granted on such grounds.[7]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' petition for mandamus.

[7] The petition's reliance upon other challenges in this Circuit glosses over substantive differences in those cases. *See* Pet. at 38-39 (characterizing other litigation in Louisiana, Mississippi, and Texas as "similar cumulative-effects claims"). For instance, unlike the present case, two of those cases actually bring a separate "cumulative burden" claim. Ex. A to Br. for the States of Tex. and Miss. as Amici Curiae Supp. Pet. ¶¶ 148-49 (*Jackson Women's Health Org. v. Currier*, No. 3:18-cv-171 (S.D. Miss.)); *accord* Second Am. Compl. for Declaratory & Injunctive Relief ¶¶ 174-75, *June Med. Servs., LLC v. Gee*, No. 3:17-cv-444 (M.D. La.), ECF No. 88 (alleging "[t]he 2016 Restrictions cumulatively violate Plaintiffs' patients' right to liberty and privacy"). These cases are also procedurally distinct from the present action. The Texas litigation to which Defendants cite is awaiting a ruling from the district court on defendants' motion to dismiss, *Whole Woman's Health All.*, No. 1:18-cv-500, and a motion to dismiss has not yet been filed in the Mississippi case, *Jackson Women's Health Org.*, No. 3:18-cv-171. To the extent Defendants rely upon those cases as a basis for granting the petition, *see* Pet. at 38 ("Even if this case alone did not call for mandamus, it is a harbinger of things to come"), the petition requests an advisory opinion. Granting the petition would be an abuse of process that is prejudicial to the plaintiffs in those cases and ignores the role of the district courts. For these same reasons, Texas and Mississippi *amici*'s request for the Court to weigh on their cases at this juncture is unavailing.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on June 14, 2019, this motion was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using its CM/ECF system, which will send a notice of electronic filing to all parties.

/s/ Shannon Rose Selden

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The undersigned certifies that:

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